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No. 79-1244

In the Supreme Court of the United States

OCTOBER TERM, 1979

EVELYN FALKOWSKI, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
VELLA M. FINK
Attorneys
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

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OPINIONS BELOW

The opinion of the court of appeals issued on July 25, 1979 (Pet. App. 2a-5a), and a related opinion of the court of appeals issued on April 25, 1979 (Pet. App. 25a-26a), are unpublished. The opinion of the district court issued on November 21, 1978 (Pet. App. 6a-22a), is reported at 464 F. Supp. 1016. The related opinions of the district court issued on Novem-

ber 30, 1976 (Pet. App. 27a-46a), and on September 11, 1975 (Pet. App. 58a-80a), are reported at 74 F.R.D. 360 and 400 F. Supp. 409 respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1979. A petition for rehearing was denied on October 29, 1979. On January 9, 1980, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including February 11, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in vacating as moot orders of the district court without reviewing the factual findings of that court.

STATEMENT

This case is part of a complicated series of litigations involving the internal administration of the Equal Employment Opportunity Commission's district office in Birmingham, Alabama. Because of recurring intraoffice disputes, the EEOC had proposed in August 1975 to "detail" Bertram Perry, the deputy district director of the office, to an EEOC office in Washington, D.C. (Pet. App. 4a). Perry brought an action seeking to enjoin that detail and on September 11, 1975, the district court entered findings

of fact and a preliminary injunction prohibiting the removal of Perry from his position in Birmingham (Pet. App. 58a-80a).[1]

In April 1976, petitioner, the district director of the Birmingham office, filed suit against the chairman and other officers of the Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, and under Exec. Order No. 11478 and 42 U.S.C. 1981, 1983 and 1985. She alleged that the Commission had impermissibly retaliated against her for having filed a previous suit against the agency by refusing her certain administrative support and by withholding aspects of authority usually accorded district directors (Pet. App. 3a, 7a, 53a). While the action was pending, on May 3, 1976, the Commission restored petitioner's full authority as district director (Pet. App. 53a). In addition, efforts to detail respondent Perry to Washington were abandoned after the issuance of the preliminary injunction (Pet. App. 44a).

On November 30, 1976, the district court issued orders dismissing as moot both petitioner's and Perry's actions (Pet. App. 27a-46a, 52a-55a). The court held that petitioner's action had become moot because it was undisputed that petitioner had been exercising the full authority of a district director

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[1] Petitioner was originally a defendant to that suit, but the complaint was dismissed as to her on November 23, 1976 (Pet. App. 47a-48a). Petitioner's motion to reconsider the dismissal was denied (Pet. App. 49a-51a).

since May 3, 1976, and there was no reason to believe that resumption of the conduct alleged in the complaint was likely (Pet. App. 53a). Similarly, the court held that no live controversy remained in Perry's case because there was no longer an effort to remove him, and it dissolved the preliminary injunction that had been entered in September 1975 (Pet. App. 44a-45a). However, in order to protect Perry against a recurrence of allegedly retaliatory actions, the district court "retain[ed] jurisdiction" of both suits and enjoined the Commission from initiating procedures to remove either petitioner or Perry without prior court approval (Pet. App. 44a-45a, 54a, 56a-57a). Petitioner and the EEOC appealed from these orders.

While these appeals were pending, problems in the Birmingham office continued. In November 1977, the EEOC filed petitions in the district court for leave to begin administrative proceedings against petitioner and Perry to terminate their employment. These petitions were later amended to seek permission only to transfer petitioner and Perry to different jobs in Washington. In November 1978, the district court ruled on these petitions (Pet. App. 6a-22a). It dissolved the injunction against petitioner's removal, finding that the Commission had legitimate grounds for taking action against her (Pet. App. 12a-14a). The court, however, refused to dissolve the injunction as to Mr. Perry, finding that a retaliatory motive existed for the attempted transfer of Perry (Pet. App. 19a-22a). Petitioner and the EEOC noted appeals from this decision as well.

On April 25, 1979, the court of appeals ruled on the first set of appeals taken from the district court's decision of November 30, 1976, holding that "[t]he district court correctly dismissed these actions without prejudice on account of mootness" (Pet. App. 25a-26a). The court, however, also held that in light of the mootness the district court had improperly retained jurisdiction, and it vacated the outstanding injunctions against actions to remove either Perry or petitioner. The court stated (*ibid.*): "[t]he effect of such dismissals [as moot] was to vacate all underlying proceedings in each case so as to spawn no consequences. The adjudication of mootness eliminated all pending controversies and left the court without jurisdiction to enter those portions of the injunction orders restricting future actions of the parties * * *."

On July 25, 1979, the court of appeals ruled on the second set of appeals taken from the district court's decision of November 21, 1978 (Pet. App. 2a-5a). The court recognized that the appeals were from orders issued in response to petitions that had been required by the November 1976 injunctions ultimately vacated on appeal, *i.e.*, that the judgment appealed from was one that would never have been entered but for the fact that the first appellate decision vacating the injunctions had not yet been entered. Accordingly, the court of appeals vacated the district court's November 1978 orders to the extent that they could be "construed as orders continuing the injunctive features of the void orders of November 30, 1976" (*id.* at 5a). It is this decision that petitioner asks this Court to review.

ARGUMENT

Petitioner contends (Pet. 5-10) that the court of appeals erred in vacating the orders of the district court as moot. Petitioner contends that because of "collateral legal consequences" of "district court findings imputing criminal activity" to petitioner (Pet. 3), the court of appeals should have either reviewed the findings of the district court or summarily reversed them. This contention is without foundation.

Petitioner asserts (Pet. 6) that two decisions of the district court, the November 1978 decision (Pet. App. 6a-22a) and the 1975 issuance of a preliminary injunction in Mr. Perry's action (Pet. App. 58a-80a), impute criminal conduct to her. Specifically, petitioner asserts, without citation, that she was found guilty by the district court of "purposely failing conciliation of cases in order to increase the business of attorneys friendly to her" (Pet. 8). In fact, nothing in either decision can be construed as a finding of criminal activity. The 1978 decision does state that petitioner acted intemperately and violated an internal EEOC guideline (Pet. App. 13a-14a). The 1975 decision quotes the testimony of an EEOC official to the effect that petitioner engaged in conduct that had been characterized as an abuse of authority (Pet. App. 64a). The 1975 decision also notes Perry's charge that petitioner gave instructions to "fail conciliation" (Pet. App. 61a), but only in the context of a decision whether to issue a preliminary injunction, not as a conclusive finding on the merits. Indeed, the court specifically stated that it

was "not passing on the propriety or impropriety of the District Director's actions" (Pet. App. 60a n.3). Thus, petitioner errs in characterizing the district court's decision as a civil case "in which a party is found to be guilty of criminal conduct" (Pet. 7).

Moreover, the decisions below involve no collateral consequences militating against a finding of mootness. In a criminal case, collateral consequences, such as a bar against owning a firearm, may well flow from a conviction. See, *e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 57 (1968). Here, however, petitioner points to no collateral legal consequence other than a vague assertion that the district court decision will have an adverse effect on petitioner's ability to defend a civil damages suit that has been brought by Mr. Perry (Pet. 8-9). Particularly in light of the court of appeals' statement that the dismissals for mootness were "so as to spawn no consequences" (Pet. App. 26a), this assertion is speculative at best. Finally, to the extent that petitioner claims to be harmed by the district court's 1975 decision (Pet. App. 58a-80a), that decision is not part of the case below and is not subject to further review. It was vacated by the district court's 1976 decision (Pet. App. 27a-46a), which was affirmed by the court of appeals on April 25, 1979 (Pet. App. 25a-26a). No petition for certiorari was filed from that decision.

Apart from the alleged collateral consequences, petitioner does not dispute that the causes of action underlying the decision below are moot. This determination was made by the court of appeals in its

April 1979 decision, which has not been challenged, and it is in accord with the decisions of this Court. See *Preiser* v. *Newkirk*, 422 U.S. 395 (1975); *Alejandrino* v. *Quezon*, 271 U.S. 528 (1926). When a legal controversy has ended, it is a waste of judicial resources to require an appellate court to review findings of a district court simply because one party is unhappy with those findings. Such a result would be at odds with the principles underlying the mootness doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
VELLA M. FINK
Attorneys
Equal Employment Opportunity Commission

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